No. 24-1130

IN THE

Supreme Court of the United States

KINGDOM OF SPAIN, PETITIONER

v.

BLASKET RENEWABLE INVESTMENTS, LLC, *ET AL.*, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE GOVERNMENT OF ROMANIA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

IOANA SALAJANU
SLV LEGAL
1 East Erie St.
Chicago, IL 60611
(773) 875-5438
ioana@slvlegal.info

PETER SHULTS
Counsel of Record
SHULTS LAW FIRM LLP
200 WEST CAPITOL AVE., SUITE 1600
Little Rock, AR 72201
(501) 375-2301
pshults@shultslaw.com

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, the Government of Romania ("Romania"), is a sovereign State and a Member of the European Union ("EU"). As such, Romania has a strong interest in ensuring that U.S. courts permit it and other EU Member States to adhere to their obligations under EU law. EU Member States are bound by EU law, including directives and decisions of the European Commission ("EC") and decisions of the Court of Justice of the European Union ("CJEU"), the EU's highest court. Romania—like petitioner, the Kingdom of Spain ("Spain")—is subject to an award issued in an arbitration that, pursuant to CJEU decisions, Romania could not and did not agree to arbitrate. There is an ongoing action in U.S. courts against Romania to enforce and execute the very arbitral award the CJEU declared as without legal effect. *See Micula v. Gov't of Romania*, No. 1:17-CV-02332 (D.D.C). The EC has enjoined Romania from making any payments on the award and from taking any action that may lead to execution on the award, and it has ordered Romania to recoup all sums paid on the award. *See* EC Decision on State Aid, No. 2015/1470 (Mar. 30, 2015) ("Injunction"). Violation of the Injunction subjects Romania to economic, legal,

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[1] Counsel of record for all parties received notice of Romania's intent to file a brief at least 10 days prior to the due date. Supreme Court Rule 37.2. Counsel for *amicus* affirm that counsel for a party did not write any part of this brief. Nor has any person or entity other than the *amicus* contributed financially to the preparation or submission of this brief. *Id.*, Rule 37.6.

and political damages. Thus, in addition to its interest in this case as an EU Member State, Romania has a specific interest in this Court's granting Spain's petition for a writ of certiorari ("Petition") due to the conflict between the EC's Injunction against Romania and the enforcement action against Romania in U.S. courts.

In *NextEra Energy Global Holdings B.V. v. Kingdom of Spain*, App. 1a-63a, reported at 112 F.4th 1088 (D.C. Cir. 2024), the D.C. Circuit erred in holding that the arbitration exception of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605(a)(6), applies in an action to enforce an arbitral award issued against a foreign State even when the State did not agree to arbitrate the dispute. As Romania explains below, the D.C. Circuit's decision in *NextEra* (the "Decision") broadened the arbitration exception beyond its intended scope, which harms Romania and other EU Member States and their relations with the United States. If the Decision stands, it also will result in an inconsistent application of the arbitration exception. This Court should grant Spain's Petition to resolve the circuit split *NextEra* created and ensure that these important international relations issues are resolved by the United States' highest Court.

SUMMARY OF THE ARGUMENT

For the first time, a federal appellate court has held that the arbitration exception to the FSIA abrogates immunity for a foreign State even if that

State did not agree to arbitrate the underlying dispute. The D.C. Circuit's Decision should be reversed, and Spain's Petition should be granted, for the following reasons (in addition to the reasons in the Petition).

First, the Decision broadened the FSIA's arbitration exception beyond its intended scope. The D.C. Circuit acknowledged the significance of "the existence" of an agreement. App. 18a, 22a-23a. But it applied the arbitration exception without first determining whether an agreement existed between the parties to arbitrate their dispute. This is contrary to the clear command of the arbitration exception's text, the legislative history, and the requirement that the arbitration exception (like the FSIA's other exceptions) be narrowly drawn.

Second, the Decision has severe negative consequences. It ignores the CJEU's holding that the Energy Charter Treaty ("ECT"), which is the basis for the D.C. Circuit's application of the arbitration exception in this case, does not contain a legal agreement to arbitrate between investors in the EU and an EU Member State. Ignoring this judgment from the EU's highest court is inconsistent with fundamental comity principles on which foreign sovereign immunity is based. Comity restrains one sovereign from encroaching on another and ensures respect for a foreign sovereign's interpretation and application of its own laws. In doing so, it promotes cooperation, facilitates smoother conflict resolution, encourages global trade, and supports diplomatic

relations. The D.C. Circuit's lack of restraint, if it stands, will harm the EU's legal order on which EU Member States rely and disrupt the clear and consistent application of EU laws. The effect of a judgment in this case would be to force Spain to violate EU law. The Decision therefore allows the U.S. judiciary to become an alternate venue for investors to sidestep EU law. There are dozens of such cases in the pipeline. The United States should not become a sanctuary for EU investors to avoid EU courts and EU law, given that these disputes are between EU actors and the investments have no direct connection to the United States.

Third, the Decision has created a circuit split that needs to be resolved. Contrary to the D.C. Circuit, the Second and Fifth Circuits have held that the FSIA's arbitration exception applies only when there is an agreement to arbitrate between the parties. Thus, if the Decision stands, the arbitration exception will apply differently depending on the U.S. court in which a foreign State is sued. This differential application of U.S. law to foreign States is at odds with this Court's pronouncements that the U.S. must speak with "one voice" when interacting with foreign States. The only way for the U.S. to speak with "one voice" in applying the FSIA's arbitration exception is if this Court grants certiorari and ends the circuit split.

These issues are enormously important for EU Member States and for relations between particular EU Member States, such as Spain or Romania, and the United States. Given these important issues, this

Court should grant certiorari.

ARGUMENT

I. The D.C. Circuit Broadened the FSIA's Arbitration Exception Beyond Its Intended Scope

A. FSIA Exceptions Are Strictly Limited and Narrowly Drawn

For more than one hundred and fifty years, U.S. courts provided foreign States with absolute immunity from suit. *The Schooner Exch. v. McFaddon*, 11 U.S. 116, 137-41, 146-47 (1812); *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). When the United States began allowing exceptions to absolute foreign sovereign immunity in 1952, those exceptions were limited. *See* Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Acting U.S. Attorney General Philip B. Perlman (May 19, 1952), *reprinted in* 26 Dep't State Bull. 984-85 (1952). When the FSIA codified foreign sovereign immunity, the limited nature of those exceptions remained. H.R. Rep. No. 94-1487, p. 7 (1976) (the FSIA "codif[ies] the so-called 'restrictive' principle of sovereign immunity").

The FSIA therefore "starts from a premise of immunity and then creates exceptions to that the general principle." *Id.*, p. 17; *see* 28 U.S.C. § 1604 (subject to the United States' existing international agreements, "a foreign state shall be immune from the jurisdiction of the courts of the United States

except as provided in sections 1605 to 1607 of this chapter"); *see also Hungary v. Simon*, 145 S. Ct. 480, 488 (2025) ("[U]nless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state." (internal quotation marks omitted)). As Congress recognized, this "basic principle"—starting with a premise of immunity that is only obviated through limited, enumerated exceptions—"may be of some advantage to foreign states in doubtful cases." H.R. Rep. No. 94-1487, p. 17. In line with Congress's recognition, the FSIA's exceptions to immunity are "narrowly drawn," *McKesson Corp. v. Islamic Republic of Iran*, 672 F.3d 1066, 1075 (D.C. Cir. 2012)—*i.e.*, they are "construed in favor of the sovereign and are not enlarged beyond what the language requires," *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1162 (D.C. Cir. 2002) (internal quotation marks omitted).

B. The Arbitration Exception Was Not Intended to Abrogate Immunity of a Foreign State That Never Agreed to Arbitrate the Underlying Dispute with the Opposing Party

The arbitration exception was added to the FSIA in 1988. Pub. L. No. 100-669, 102 Stat. 3969 (1988). In relevant part, it provides that a foreign State is not immune from the jurisdiction of U.S. courts in any case "in which the action is brought, . . . to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may

arise between the parties . . . or to confirm an award made pursuant to such an agreement to arbitrate." 28 U.S.C. § 1605(a)(6) (emphasis added). As is clear from the underlined text, and as Spain aptly demonstrated in its Petition, the exception only applies if the parties agreed to submit the underlying dispute to arbitration. *See* Petition 18-22.

The legislative history confirms this interpretation. As that history explains, Congress added the arbitration exception to allow for the "enforcement o[f] arbitration agreements in certain specified situations." 134 Cong. Rec. H10679 (Oct. 20, 1988) (150). The exception was to provide "more explicit guidance to judges" who were using the FSIA's waiver exception to find "that arbitral agreements constitute waivers in the appropriate cases." 132 Cong. Rec. S14796 (Oct. 2, 1986) (134-11). Thus, the focus was on confirming that an agreement to arbitrate waived immunity in certain circumstances. But a foreign State cannot waive its immunity through an agreement to arbitrate the dispute if the parties did not agree to arbitrate the dispute in the first place. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 441-43 (1989); *TIG Ins. Co. v. Republic of Argentina*, 110 F.4th 221, 236 (D.C. Cir. 2024) (listing the only three circumstances in which a sovereign will be treated as having impliedly waived its immunity, none of which exists in Spain's case). Since a foreign State cannot waive immunity to a dispute through a non-existent arbitration agreement, App. 72a, 148a, it follows that the arbitration exception—which was intended to

function as a waiver of immunity—was not intended to apply to a dispute a foreign State had not agreed to arbitrate. Nothing in the legislative history indicates that Congress intended that the arbitration exception would allow an action against a foreign State when the parties to the action had not agreed to arbitrate the dispute.

Contrary to the command of the arbitration exception's text and to its legislative history, the D.C. Circuit held in *NextEra* that the arbitration exception can apply in an action to enforce an arbitral award even if the parties to that action had not agreed to arbitrate the dispute. This holding disregarded the CJEU's ruling that the arbitration clause in the ECT does not apply to disputes between an EU Member State and an investor operating in an EU Member State, and it therefore cannot be invoked as the basis for an agreement between such parties. The D.C. Circuit's decision to ignore this requirement of the arbitration exception, *see* Petition 19-21, broadens that exception beyond its text and intended scope.

The D.C. Circuit's Decision, as the next section explains, has severe negative consequences for investors in the EU, EU Member States, and the United States.

II. The D.C. Circuit's Decision Has Severe Negative Consequences

A. The Decision Ignores EU Law

In *Slovak Republic v. Achmea BV*, ECLI:EU:C:2018:158 ("*Achmea*"), the CJEU held that a provision in an international agreement allowing an EU investor to initiate arbitration against an EU Member State was prohibited by Articles 267 and 334 of the Treaty on the Functioning of the European Union ("TFEU"). *Achmea*, ¶¶ 31-60. In *Republic of Moldova v. Komstroy, LLC*, ECLI:EU:C:2021:655 ("*Komstroy*"), the CJEU held that the dispute settlement mechanism in Article 26(2)(c) of the ECT is incompatible with EU law, hence Article 26 cannot be invoked to settle a dispute between an investor operating in the EU and an EU Member State. *See Komstroy*, ¶¶ 41, 42, 52, 60, 62, 66. The CJEU reaffirmed these holdings in *European Commission v. European Food SA*, ECLI:EU:C:2022:50 ("*European Food*"), when it upheld the EC's Injunction against Romania. *European Food*, ¶¶ 138-151. In doing so, the CJEU held that, once Romania acceded to the EU, "the system of judicial remedies provided for by the EU and [the EU formation] Treaties replaced th[e] arbitration procedure" in the bilateral investment treaty between Romania and Sweden under which the investors brought arbitration against Romania. *Id.*, ¶¶ 7, 145. Thus, when Romania became an EU Member State, its consent to arbitrate under the bilateral investment treaty with Sweden, "from that time onwards, lacked any force." *Id.*, ¶ 145.

The CJEU's decisions in *Achmea*, *Komstroy*, and *European Food* make clear that an EU Member State has no legal basis to agree to arbitrate a dispute against an investor operating in the EU and involving EU law. *Komstroy* was express that the ECT's arbitration clause is not an agreement to arbitrate between Spain and respondents here. *See Komstroy*, ¶¶ 52-66. The D.C. Circuit's Decision ignores the CJEU's ruling. That discarding of EU law infringes upon EU Member States' sovereignty, exposes certain EU Member States to potential sanctions for violating EU law, destabilizes the legal order in which investors operate, impacts EU Member States' economies, and will result in more intra-EU enforcement actions in U.S. courts.

B. The Decision Disregards Comity and Fails to Provide Appropriate Respect for the Sovereignty of EU Member States

Foreign sovereign immunity is based on reciprocity and comity. *See Samantar v. Yousuf*, 560 U.S. 305, 311 (2010); *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895) (comity "is the recognition which one nation allows within its territory to the legislative, executive or judicial actions of another nation"). Comity protects territorial sovereignty and freedom from interference. *See* Thomas Schultz and Niccolo Ridi, *Comity and International Courts and Tribunals*, 50 Cornell Int'l L.J. 577, 582 (2017). A "central precept" of comity is that "the decisions of foreign tribunals should be given effect in domestic courts, since recognition fosters international cooperation

and encourages reciprocity, thereby promoting predictability and stability through satisfaction of mutual expectations." *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984). For foreign sovereign immunity, comity functions as "a principle of restraint" because "it shields foreign governments" from suits in U.S. courts. William S. Dodge, *International Comity in American Law*, 115 Colum. L. Rev. 2071, 2119 (2015). The FSIA was enacted with these principles in mind, which is why, as explained above, it presumes that a foreign State has immunity in U.S. courts and allows only express, limited, and narrowly-drawn exceptions to overcome that presumption. *Hungary*, 145 S. Ct. at 488; *McKesson Corp.*, 672 F.3d at 1075.

By applying the arbitration exception to abrogate Spain's immunity regardless of whether Spain agreed to arbitrate the underlying dispute, the Decision lacked restraint and failed to give appropriate deference to Spain's sovereign authority. *See* Dodge, *supra*, at 2127-37; *see also Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522, 546 (1987). The encroachment on Spain's sovereignty is compounded because the Decision also ignored adjudicative comity. In not requiring an agreement to arbitrate between the parties, the D.C. Circuit ignored the CJEU's decisions in *Achmea* and *Komstroy*, which expressly declared the relevant arbitration mechanisms void. *See* Dodge, *supra*, at 2105 ("Prescriptive comity has an adjudicative counterpart . . . defined as deference to foreign courts."). The appropriate approach,

consistent with adjudicative comity, would have been to adhere to the CJEU's decision that no arbitration agreement existed between the parties.

This lack of restraint also is at odds with comity's applications in other U.S. legal doctrines. The presumption against extraterritoriality, for instance, is based in part on the comity-as-restraint rationale by "serv[ing] to protect against unintended clashes between [the United States'] laws and those of other nations which could result in international discord." Dodge, *supra*, at 2102. Similarly, this Court encourages comity through restraint by "constru[ing] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004).

Thus, even if the arbitration exception is ambiguous about whether an agreement to arbitrate is required, such ambiguity should be construed in the foreign State's favor. As this Court explained earlier this term, the FSIA should be interpreted "to avoid, where possible, producing friction in our relations with other nations and leading some to reciprocate by granting their courts permission to embroil the United States in expensive and difficult litigation." *Hungary*, 145 S. Ct. at 494. The Decision ignores that command and further erodes "international cooperation," "reciprocity," "predictability[,] and "stability." *Laker Airways Ltd.*, 731 F.2d at 937.

As the next section explains, the D.C. Circuit's

lack of restraint harms EU Member States and their reliance on the EU's legal order and economic integration. This legal order and economic integration benefit EU Member States and global investors.

C. The Decision Harms EU Member States' Reliance on the EU's Legal Order and Economic Integration

The CJEU's decisions in *Achmea, Komstroy*, and *European Food* were based on the primacy of EU law. *See Komstroy*, ¶¶ 42-43; *Achmea*, ¶¶ 33, 60, *European Food*, ¶ 138. They aimed to ensure a structured network of principles, a legal order providing consistency and uniformity in the interpretation and application of EU law, and an effective judicial protection of the rights of its participants. *See Komstroy*, ¶¶ 43-45; *Achmea*, ¶¶ 33-36; *European Food*, ¶ 138. The CJEU therefore has "exclusive jurisdiction to give the definitive interpretation of that law." *Komstroy*, ¶ 45 (citing *Achmea*, ¶ 35).

A tribunal outside of the EU's judicial system lacks jurisdiction to override the CJEU's interpretation or application of EU law. *See Komstroy*, ¶ 45; *Achmea*, ¶ 42; *European Food*, ¶¶ 138-140. An international agreement cannot overcome this jurisdictional prohibition, because the EU's formation treaties take precedence over other treaties. *Achmea*, ¶ 32. The primacy of EU law, and the exclusivity of the EU's judicial system to interpret and apply that law, "has the object of securing

uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the [EU formation] Treaties." *Id.*, ¶ 37; *see Komstroy*, ¶ 62 ("[T]he exercise of the European Union's competence in international matters cannot extend to permitting . . . in an international agreement, a provision according to which a dispute between an investor of one Member State and another Member State concerning EU law may be removed from the judicial system of the European Union such that the full effectiveness of the law is not guaranteed.").

As those cases explain in depth, the primacy of EU law and the consistent application of that law through the EU's judicial system are foundationally important to the EU. *See Achmea*, ¶¶ 33-34 ("EU law is thus based on the fundamental premis[e] that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded . . . .").

The disturbance of this legal order threatens to harm individual EU Member States, such as Romania, that depend on the EU's single-market system. That system is premised on legal order and the consistent application and enforcement of market competition rules. *See* Iain Begg, *The European Union and Regional Economic Integration: Creating Collective Public Goods – Past, Present and Future*, European Parliamentary Research Service, PE 689.369, p. 3 (Mar. 2021); Jo Shaw, *A European*

Integration, The Oxford Encyclopedia of EU Law, p. 1 (June 2022); Nicolas F. Diebold, *Assessing Competition in International Economic Law: A Comparison of 'Market Definition' and 'Comparability,'* 38 Legal Issues in Economic Integration 115, 118-19 (§ 2.2) (2011); *see also* Consolidated Version of the Treaty on the Functioning of the European Union, 2012 O.J. (C 326), title VII, ch. 1. Through clear, consistent, and fair application and enforcement, the EU's competition rules aim to prevent distortion of competition by applying the same rules to all participants and creating a stable and predictable business environment for all market competitors. *See* Fiona Scott Morton, *The Three Pillars of Effective EU Policy*, Bruegel (Sept. 20, 2024).

The CJEU, as seen in its decisions in *Achmea, Komstroy*, and *European Food*, has been pivotal in protecting the EU's economic and legal order. *See* Begg, *supra*, p. 3; Diebold, *supra*, at 120; Grigorios Bacharis, Consten and Grundig *and the Inception of an EU Competition Law*, 6 European Papers – A Journal on Law and Integration 553, 554 (2021). These decisions, among others, prevent legal fracturing by creating a consistent, stable, and predictable framework for fair application and enforcement EU law.

This benefits EU Member States and investors alike. The primacy of EU law ensures fewer country-by-country deviations on competition policy or investment protection. A U.S. company doing

business in the EU, for example, can take comfort that EU competition law applies to all EU Member States, often abrogating a need for the U.S. company to navigate different and incongruent regulations from individual EU Member States.

D. The Decision Could Force EU Member States to Violate EU Law

The Decision disrupts the clarity, integration, and uniform dispute resolution that the CJEU's *Achmea, Komstroy,* and *European Food* decisions have tried to provide. It ignores these CJEU judgments and creates access to a new forum, the U.S. judiciary, to which EU investors can escape to avoid their obligations under EU law—the law under which these investors chose to operate their businesses. Investors in the EU should not be able to choose the EU laws they follow and those they discard. Using U.S. courts for this purpose grants these investors special treatment over the remaining investors in the EU that adhere to EU laws without forum shopping.

Allowing such forum shopping therefore harms EU Member States, such as Romania, that depend on the EU's economic and legal structure. This legal structure includes Article 344 of the TFEU, which provides that EU Member States cannot "submit a dispute concerning the interpretation or application of the [EU formation treaties] to any method of settlement other than those provided for" in the EU formation treaties. This provision limits an EU Member State's dispute-resolution options, but it

simultaneously is a provision upon which an EU Member State can rely to ensure that its dispute against an EU investor will be resolved within the EU judiciary. An EU Member State is harmed when it can no longer rely upon the EU judiciary to resolve disputes premised upon EU law.

The *Micula v. Government of Romania* pending enforcement action demonstrates these harms. An arbitral tribunal issued an award against Romania, despite the EC's intervention and assertion that any award issued by the tribunal would be contrary to EU law and any payment on the award would constitute state aid. In response, the EC issued the Injunction. *See* Injunction, arts. 1-5.

Ignoring the EC's Injunction and the CJEU's decisions, the EU investors commenced their enforcement action, which the EC and Romania have asserted is in violation of EU law. The U.S. District Court for the District of Columbia has confirmed the arbitral award as a judgment that can be enforced in U.S. courts. *See Micula v. Gov't of Romania*, 404 F. Supp. 3d 265, 285-86 (D.D.C. 2019). Simultaneously, as an EU Member State, Romania must adhere to the CJEU's decisions concluding that the arbitral award violates EU law and to the EC's Injunction prohibiting it from paying on the award or engaging in any activity that may lead to enforcement of the award. *European Food*, ¶¶ 127-151; Injunction, arts. 1-2. Violation of the Injunction subjects Romania to fines and penalties. Hence, Romania is subject to conflicting orders from two legal systems. *See*

Injunction, arts. 3-5. It cannot obey both conflicting obligations. This harms investors, too, because they also must navigate the unclear legal hierarchy and conflicting orders. Additionally, this lack of consistency and predictability creates uncertainty in the marketplace in which these actors operate.

The Decision entrenches this legal quagmire instead of deferring to the CJEU's decision and application of EU laws. These cases are not isolated—if the D.C. Circuit's decision holds, there are likely to be dozens of new cases in which arbitral awards conflict with EU law and CJEU orders, possibly subjecting EU Member States to sanctions over and over again.

E. The Decision Will Result in More Actions in U.S. Courts by EU Investors Trying to Override EU Law

The Decision makes U.S. courts a safe haven for EU investors trying to avoid EU law. There are numerous such cases ongoing in U.S. courts. As the Petition explains, Spain itself is a party to eleven other such cases. *See* Petition 18. Romania, Italy, Croatia, Poland, and Bulgaria are parties to others.[2]

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[2] In addition to *Micula v. Gov't of Romania*, No. 1:17-CV-02332 (D.D.C) (discussed above), see, for example, *CEF Energia B.V. v. Italian Republic*, No. 1:19-CV-3443 (D.D.C.); *Greentech Energy Sys. a/s v. Italian Republic*, No. 1:19-CV-3444 (D.D.C.); *MOL Hungarian Oil and Gas plc v. Republic of Croatia*, No. 1:23-CV-218 (D.D.C.); *Mercuria Energy Group v. Republic of Poland*, No.

There also are several dozen ongoing arbitrations against EU Member States arising out of alleged breaches of the Energy Charter Treaty.[3] If the Decision stands, U.S. courts will be used repeatedly to recognize arbitral awards against EU Member States that have been issued in violation of EU law and have no legal effect under EU law.

These disputes generally will have no direct connection to the United States. No good reason exists to expand the arbitration exception to apply to these cases, *see supra* Section I—especially when, as explained, they can affect comity, reciprocity, and other foreign-affairs matters and can "produc[e] friction in [the United States'] relations with other nations." *Hungary*, 145 S. Ct. at 494 (internal quotation marks omitted). On the contrary, good reasons exist not to open U.S. courts to these cases. The natural forum for these cases, as the Petition explains, is the EU judiciary. *See* Petition 23 ("It's hard to imagine a more overt case of forum-shopping to avoid European courts than what happened here.").

Nothing in *Achmea* or *Komstroy* prevents an investor from commencing an action against a State in the EU judiciary. And, if an investor obtains a judgment in the EU legal system, the investor has the

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1:23-CV-3572 (D.D.C.); *ACF Renewable Energy Ltd. v. Republic of Bulgaria*, No. 1:24-CV-1715 (D.D.C.).

[3] A database of known investor-State arbitrations can be found at Investment Dispute Settlement Navigator, Investment Policy Hub, UNCTAD, http://bit.ly/3SjsxBl.

right to enforce that judgment in U.S. courts. Here, though, the investors chose to violate EU law. They had the option to withdraw their arbitrations and pursue litigation in the appropriate EU legal forum but chose not to do so.

III. The Circuit Split Creates Inconsistent Application of the Arbitration Exception Against Foreign States

As the Petition explains, the D.C. Circuit's Decision has created a circuit split. The Second and Fifth Circuits have held, consistent with the arbitration exception's text, that an agreement between the parties to arbitrate the underlying dispute is necessary for the arbitration exception to apply. *Al-Qarqani v. Saudi Arabian Oil Co.*, 19 F.4th 794, 802 (5th Cir. 2021), *cert denied*, 142 S. Ct. 2753 (2022) (Mem.); *Cargill Int'l S.A. v. M / T Pavel Dybenko*, 991 F.2d 1012, 1018-20 (2d Cir. 1993). As discussed, the D.C. Circuit has now held that such an agreement is not necessary. App. 17a-27a.

Because of this circuit split, the arbitration exception applies differently for Spain, Romania, and other foreign States in the D.C. Circuit than it does in the Second and Fifth Circuits. This differential application applies to ongoing cases and, if the D.C. Circuit's decision stands, to a flood of potentially new cases. *See supra* Section II.E. Thus, a foreign State may be provided immunity under the arbitration exception in one circuit but not in another, even if the

relevant circumstances are the same.

In the realm of foreign affairs, consistent application of U.S. laws is important. As this Court has explained, the United States needs to speak as "one voice" when interacting with foreign States. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413-15 (2003); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 381-82 (2000); *Japan Line, Ltd. v. Los Angeles Cnty.*, 441 U.S. 434, 449 (1979). Because foreign sovereign immunity decisions are now made by U.S. courts, only this Court has authority to ensure that the United States speaks with one voice when it determines whether a foreign State is entitled to immunity from suit. This Court should grant certiorari to ensure consistent application of the FSIA's arbitration exception.

CONCLUSION

For the foregoing reasons, *amicus curiae* the Government of Romania urges this Court to grant the Kingdom of Spain's petition for a writ of certiorari.

Respectfully submitted,

IOANA SALAJANU
SLV LEGAL
1 East Erie St.
Chicago, IL 60611
(773) 875-5438
ioana@slvlegal.info

PETER SHULTS
Counsel of Record
SHULTS LAW FIRM LLP
200 WEST CAPITOL AVE.,
SUITE 1600
Little Rock, AR 72201
501-375-2301
pshults@shultslaw.com

Counsel for Amicus Curiae